Office-Supreme Court, U.S.
FILED
OCT 17 1961
JAMES R. BROWNING, CLERK

LIBRARY

No. 499

Supreme Court of the United States

October Term, 1961

CHUNG WING PING, *et al.*,

Petitioners.

AGAINST

ROBERT F. KENNEDY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ABRAHAM LEBENKOFF,
Attorney for Petitioners.
33 West 42nd Street,
New York 36, N. Y.

JULES E. COVEN,
Of Counsel.

LODER APPEAL PRESS, INC., 41 VESEY STREET WOrth 2-0689

INDEX

	PAGE
Jurisdiction	1
Questions Presented	1
Statutes and Regulations Involved	2
Statement	4
Why Certiorari Should Be Granted	5
Conclusion	12
Appendix	13

CASES CITED

Arnstein v. Porter (C. C. A. 2d) 154 F. 2d 464	8
Dewey v. Clark, 180 F. 2d 766	8
Dombrovskis v. Esperdy, 185 F. Supp. 478	2, 16
Krug v. Santa Fe Fac. R. Co., 158 F. 2d 337 (C. A., D. C.)	7
McGrath v. Kristensen, 340 U. S. 162, 71 S. Ct. 224	6
Shaughnessy v. United States, 349 U. S. 280, 75 S. Ct. 746	6
Toebelman v. Missouri-Kansas Pipe Line Co., 130 F. 2d 1016	9

PAGE

United States ex rel. Adel v. Shaughnessy, 183 F. 2d 371 (C. A. 2d) 11

United States v. Shaughnessy, 347 U. S. 260, 74 S. Ct. 499 6

STATUTES CITED

28 U. S. C. 1254(1) 1

5 U. S. C. §1009 2

28 U. S. Code §2201 3

F. R. C. P. 56(f) 3, 10

U. S. C. Sec. 1255 4

8 U. S. C. §245 5

50 U. S. C. App. 1971(a) 5

8 CFR 245.1, as amended May 1 1959, 24 F. R. 3491 7

Supreme Court of the United States

OCTOBER TERM, 1961

CHUNG WING PING, *et al.*,

Petitioners,

AGAINST

ROBERT F. KENNEDY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia affirming a judgment of the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on July 20, 1961. Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether the District Court abused its discretion and denied Petitioners due process when it refused to postpone Defendant-Appellees' motion for summary judg-

ment in order that Petitioners could take depositions of Defendant-Appellees to discover proof of the failure and absence of administrative discretion by virtue of a prearranged understanding and agreement to deny Petitioners a visa and adjustment of status to that of a permanent resident.

2. Whether the District Court abused its discretion and denied Petitioners due process when it refused to incorporate as part of the record below the depositions of Appellees in a civil action entitled *Dombrovskis* v. *Esperdy*, 185 F. Supp. 478.

3. Whether summary judgment can be allowed in an action for declaratory judgment and review of an administrative order when the Plaintiff alleges that the defendants had not exercised their administrative discretion because of a prearranged understanding and agreement to exclude all alien seamen from the benefits, priviliges and rights provided by the Immigration and Naturalization Laws.

Statutes and Regulations Involved

5 U. S. C. 1009

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably de-

layed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privileges, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, 10, 60 Stat. 243.

28 U. S. Code 2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85-508, 12(p), 72 Stat. 349.

F. R. C. P., 56(f):

When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that

he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Statement

Petitioners are Chinese aliens who effected entry into the United States while crewman aboard vessels lying at port in the United States. Each sought to adjust his status, pursuant to U. S. C. Sec. 1255, to that of a refugee-escapee lawfully admitted for permanent residence on the ground that they are aliens who had fled from a Communist area because of persecution or fear of persecution on account of race, religion or political opinion. The Petitioners' first application for relief was denied on the basis that existing regulations made them ineligible. Subsequently the regulations were amended following litigation questioning the validity thereof. Thereafter, Petitioners received notice to resubmit application but upon duly filing such application, defendants again denied the relief sought by Petitioners. The instant action was thereupon instituted by Petitioners.

Upon joinder of issue by filing an answer, the defendants below moved for summary judgment, relying primarily on the administrative record to support their view that there was no genuine issue as to material fact. Petitioners opposed, asserting that there were genuine issues of fact and requested by written motion a postponement of motion for summary judgment until they had taken depositions of Defendants below. The District Court below refused such request for a postponement and granted judgment on the merits to Defendants.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, that Court concluded that the lower court had not abused its discretion in denying the motion for a continuance partly because the motion for depositions was not filed and made promptly, in addition to questioning the propriety of permitting the Petitioners to take depositions of the defendants.

Why Certiorari Should Be Granted

Certiorari is sought so that this Court may determine two issues of recurring importance in the field of Administrative litigation.

The first is the question of the circumstances which would permit the taking of depositions of officers of government agencies by parties who feel they were wronged by the decisions of the agency. In the present day society where there are more and more administrative agencies affecting the lives of the general public this becomes a very important consideration. Are the Petitioners or people in similar situations, where a claim is made that no administrative discretion was exercised, entitled to examine the officers of employees of the agency that did not exercise its discretion.

The second issue is under what circumstances can a court grant summary judgment when an issue of fact is raised and can a court on a motion for summary judgment sit as a trial court and decide the issues of fact raised in the pleadings.

The Congress specifically provided in 8 U. S. C. 245 and 50 U. S. C. App. 1971 (a) a well-delineated procedure for the issuance of special refugee visas and the adjustment of status of aliens possessing such visas. Im-

plicit and expressed in such acts were the obligation on appropriate officials of the United States to exercise administrative discretion in finding the facts and circumstances on which the eligibility of an applicant is determined. *McGrath* v. *Kristensen*, 340 U. S. 162, 71 S. Ct. 224.

Petitioners alleged the existence of a "void and illegal" agreement (amounting to a conspiracy) to arbitrarily discriminate against Petitioners by automatically declaring such persons ineligible for a visa and an adjustment in status. The affidavits, filed with the Court below, made it clear that Petitioners' position was predicated on the failure to exercise and absence of administrative discretion making the decision of defendants below, arbitrary, capricious, discriminatory and contrary to law. It is the failure of Defendants below to exercise administrative discretion, and not erroneous and incorrect administrative action, which is the essence of Petitioners' complaint.

This in *United States* v. *Shaughnessy*, 347 U. S. 260, 268, 74 S. Ct. 499, 503 (first "*Accardi*" case), clearly enunciated that in a situation similar to the instant case, such issue (absence of or failure to exercise administrative discretion) was the dominant theme of Petitioners' cause of action, and despite the possibility that the pertinent allegations may not be susceptible of proof before the court below, an aggrieved applicant is " ' ' ' entitled to the opportunity to try ' ' ' " The basic concept underlying the two "*Accardi*" cases, *United States* v. *Shaughnessy*, *supra*, and *Shaughnessy* v. *United States*, 349 U. S. 280, 75 S. Ct. 746, is that an allegation of absence of, or failure to exercise administrative discretion, is an issue which must be decided by the trial court before it can review the administrative record.

The Petitioners' charge of the existence of a void and illegal agreement is not based on mere suspicion but on the history of the conduct of the Defendants in consistently rejecting requests of such alien seamen. The Petitioners point to the fact that the regulations first issued by Defendants expressly excluded alien seamen from the benefits of the law but that other litigation was commenced to declare such regulations invalid; the regulations were amended ostensibly to extend the benefits of the law to aliens (8 CFR 245.1, as amended May 1, 1959, 24 F. R. 3491). The Petitioners also point to the fact that, following the amendment to the regulations, their application for visas as well as those of other crewmen were again denied, with the Defendants asserting that not one of them possessed the necessary "qualifications" for the issuance of a visa, a necessary prerequisite to consideration of their request for an adjustment of status.

We do not have here a situation where specious argument or spurious allegations are stated in sweeping generalities but a clearly-defined allegation, the truth of which was put in issue by the denial in Defendants' answer. Such an issue was clearly genuine and material, for until it was decided, analysis of the administrative record was futile and meaningless.

The function of summary judgment is to avoid a useless trial. In ruling on such a motion, the Court's function is to determine whether such a genuine issue exists and not to resolve any existing factual issues. *Kraa* v. *Santa Fe Pac. R. Co.*, 158 F. 2d 317 (C. A., D. C.). The inescapable fact here is that the Court below resolved the fact issue raised by Petitioner by reference to the pleadings and administrative record and, in effect, sitting as a trial court, adjudicated solely on the basis of oral argument and Defendants' self-serving administrative record. This

is not the function of summary judgment. *Arnstein* v. *Porter* (C. C. A. 2d) 154 F. 2d 464, 471. This Court plainly enunciated the scope and limitations of summary judgment procedure in *Dewey* v. *Clark*, 180 F. 2d 766, as follows:

> "Our study of the question makes the following points clear: (1) Factual issues are not to be tried or resolved by summary judgment procedure; only the existence of a genuine and material factual issue to be determined. Once it is determined that there is such an issue summary judgment may not be granted; (2) In making this determination doubts (of course the doubts are not fanciful) are to be resolved against the granting of summary judgment; (3) There may be no genuine issue even though there is a formal issue. Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment. On this point the cases decided by this court must rest on their own facts rather than upon a rigid rule that an assertion and a denial always preclude the granting of summary judgment. Those cases stand for the proposition that formalism is not a substitute for the necessity of a real or genuine issue. Whether the situation falls into the category of formalism or genuineness cannot be decided in the abstract; (4) If conflict appears as to a material fact the summary procedure does not apply unless the evidence on one or the other hand is too incredible to be accepted by reasonable minds or is without legal probative force even if true; (5) To support summary judgment the situation must justify a directed verdict insofar as the facts are concerned."

Petitioners' position is that sound judicial discretion required the District Court to grant the postponement they sought. The information they desired to elicit was relevant to the case, was within the peculiar knowledge of defendants below concerned a primary issue in the case, witnesses were easily available, no undue burden or costs would be imposed on defendants below and adequate safeguards could have been imposed to assure prompt discovery procedures. The failure to grant the postponement permitted an adjudication affecting life and liberty of these Petitioners solely on the basis of the self-serving administrative reports of admittedly ex parte activities of the defendants below. The Third Circuit in *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016, very plainly states the dangers of denying such relief on a motion for summary judgment as follows:

> "* * * This case illustrates the danger of founding a judgment in favor of one party upon his own version of facts within his sole knowledge as set forth in affidavits prepared ex parte. Cross-examination of the party and a reasonable examination of his records by the other party frequently bring forth further facts which place a very different light upon the picture. The plaintiffs should, therefore, be given a reasonable opportunity, under proper safeguards, to take the depositions and have the discovery which they seek."

Petitioners sought in the Court below to postpone the motion on summary judgment until they had taken depositions of representatives of defendants below, or in the alternative, permission to incorporate the depositions of defendants below taken in other proceedings, but the defendants and the Court refused such request.

F. R. C. P. 56(f) provides:

> *When Affidavits are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The Petitioners complied with this rule. Prior to hearings on motion for summary judgment, they filed their request for such postponement; it was supported by affidavit. To demonstrate their good faith and avoid further delay they were even willing to have prior depositions taken in *Dombrowskis* v. *Esperdy* (*supra*), incorporated as part of the record. The Court below, however, would not even follow the procedure pursued in a related case in the United States District Court for the Southern District of New York, where Honorable Judge Dimock stated:

> "Plaintiff's claim, however, that if they are permitted to take the depositions of the Commissioner of Immigration and Naturalization or a deputy designated by him, of defendant or a deputy designated by him, and of other persons whose identity is still to be determined, they can obtain evidence to support their claims. Knowledge of the facts may, as plaintiffs claim, be exclusively or largely under the control of defendant and, until plaintiffs have had an examination of defendant and or those closely associated with him, I do not wish to foreclose the possibility of their establishing their claims. See Peter Pan Fabrics, Inc. & Henry Glass & Co. v. Dixon Textile Cor-

> poration, 2 Cir., 280 F. 2d 800. I therefore grant plaintiffs' cross-motion, pursuant to Rule 56(f), for an opportunity to take depositions on condition that plaintiffs complete the discovery requested in their 'Notice of Motion Under Rule 56 (f), F. R. Civ. P.' within 90 days after the appearance of a note of this decision in the New York Law Journal." *Dombrowski v. Esperdy, supra.*

The ineluctable fact is that in the instant case Plaintiff asserts that neither "benefit" to the United States nor "concern" for the refugee prompted the instant administrative action. Petitioners contend that it is a predilection to alien crewmen, which prompted the arrangement between the Defendants below, resulting in the complete failure to exercise administrative discretion.

Petitioners, in the present posture of the case, do not say they have been denied review of administrative discretion in the court below, but rather that the court could not and did not consider whether there was an absence of or failure to exercise such administrative discretion. It is this asserted clear failure to exercise discretion (conceding for the present the authority to exercise discretion) which is the foundation of Appellants' case.

Petitioners concede that the courts have very limited and restricted powers to review administrative discretion but do urge that the failure to exercise such discretion can be reviewed by the Courts and where such failure is found to exist by the Court, it can require that the discretion be exercised. *United States ex rel. Accardi v. Shaughnessy*, 183 F. 2d 371, (C. A. 2d) (see fn. 3, p. 372)

CONCLUSION

Wherefore, in consideration of the magnitude of the questions presented and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Dated: New York, New York, October 16, 1961

Respectfully submitted,

ABRAHAM LEBENKOFF,
Attorney for Petitioners,
33 West 42nd Street,
New York 36, N. Y.

JULES E. COVEN,
Of Counsel.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,105

CHUNG WING PING, *et al.*,

Appellants

v.

ROBERT F. KENNEDY, Attorney General of the United States, *et al.*,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided July 26, 1961

Mr. I. H. Wachtel for appellants.

Mr. Frank Q. Nebeker, Assistant United States Attorney, with whom Messrs. Oliver Gasch, United States Attorney at the time of argument, and Carl W. Belcher, Assistant United States Attorney at the time of argument, were on the brief, for appellees. Messrs. David C. Acheson, United States Attorney, and Donald S. Smith, Assistant United States Attorney, also entered appearances for appellees.

Before Prettyman, Danaher and Bastian, Circuit Judges.

Bastian, Circuit Judge: Appellants are Chinese aliens who entered the United States while crewmen aboard vessels lying at port in this country. Each has illegally remained in the United States and each has sought to adjust his status, pursuant to 8 U.S.C. 1255 (1958), to that of a permanently admitted refugee from communism who had fled his native land because of persecution or fear of persecution on account of race, religion or political opinion.

Appellants' first application to the Attorney General for discretionary relief under the statute was denied on the ground that existing regulations as to alien crewmen made them ineligible for such relief. Following litigation questioning these regulations, the regulations were amended and, thereafter, appellants received notice to resubmit their applications, which was done. Appellees again denied the relief requested, and, on December 2, 1959, appellants filed in the District Court complaint for declaratory judgment and injunctive relief, seeking to compel appellees to grant the relief sought and alleging that the denial of such relief was arbitrary and capricious, not on the merits, and the result of a "void and illegal agreement" between the appellees not to grant such relief to any Chinese alien crewman. The administrative orders denying relief on these cases in each instance recites that the action was taken only after consideration of each case on the merits.

On September 9, 1960, appellees filed a motion for summary judgment. On the day before the hearing of that motion, appellants moved for a continuance to permit them to interrogate by discovery proceedings certain Government officials in order to obtain evidence of the

alleged "void and illegal agreement," which evidence it is alleged was exclusively within the possession of appellees. Affidavit of counsel for appellants was attached to the motion for continuance and contained, in pertinent part, the following:

> "That the basis of the complaint is that upon Information and belief the plaintiffs *believe* that there was an illegal agreement between the State Department and the Immigration and Naturalization Service in that crewmen who applied for relief under Section 15(a)(3) of the Act of September 11, 1957 were denied the issuance of visas and the subsequent adjustment of status solely because they were crewmen and for no other reason. *That it is believed* that there was an agreement between the offices of the two defendants that seamen would be treated differently than other immigrants who were in this country. [Emphasis supplied.]
>
> "That the information regarding this illegal conspiracy is solely within the knowledge of the defendants and for the plaintiffs to properly pursue their causes of action then they must be permitted to question various employees of the defendants. That even in the argument of the defendants' motion for summary judgment the plaintiff is seriously handicapped in not having any information which is solely in the hands of the defendants.
>
> "That upon information and belief your deponent feels that the applications of these plaintiffs was not on the merits of each individual case but it was based on the manner that the alien entered the United States. . . ."

Appellees supported their motion for summary judgment by a certification of the administrative record de-

tailing the administrative procedures followed with respect to the several applications for discretionary relief.

The trial judge denied appellants' motion for a continuance and granted judgment for appellees on the merits on their motion for summary judgment. This appeal followed.

We are met at the outset by the Government's suggestion of mootness, which is based on the amendment to §245(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1255(a), withdrawing the discretion of the Attorney General to grant the relief here sought in the case of applicants such as the present appellants. Appellants claim their action is retrospective in nature and relates back to a date on which the Attorney General still possessed such power. In the view we take of the case, it is unnecessary for us to decide the issue of mootness.

The administrative record filed with the District Court as part of appellees' answer to the complaint is complete and regular on its face and furnishes not the slightest indication of any "agreement" such as that alleged in the complaint. The complaint itself, reciting no facts giving rise to any inference of such an agreement, is couched in legal conclusions.

At the hearing on the motion for summary judgment and on appellants' motion for a continuance, appellants stated that they were unable even to argue effectively the motion for summary judgment without the information they sought to obtain by discovery. It is beyond dispute that a motion for continuance is addressed to the sound discretion of the court. We note that appellants did nothing to obtain discovery until some ten months after filing their complaint, when the merits of their case was called into question by the summary judg-

ment procedure. Diligent prosecution of a cause of action which is dependent *for success upon* discovery demands that the plaintiff seek discovery in preparation of his case and not as a backdoor defense to a test of the merits of his claim.

The simple fact of the present case is that counsel must have known that, if appellants had a cause of action, it depended entirely on matters *de hors* the record, the administrative record being unassailable. Yet no effort was made to obtain discovery until the eve of the hearing of the motion for summary judgment. There has been no claim of excusable neglect or inadvertence. Accordingly, we cannot say that the trial judge abused his discretion in refusing the continuance.

Further, we think there was, in any event, no sufficient basis for the taking of depositions of the appellees. Assuming that the taking of the testimony of the Government officials under the circumstances here was proper — a matter of considerable doubt — certainly they should not have been compelled to submit to a fishing expedition based on an unsupported and nebulous allegation of criminal conspiracy. The rule has been admirably stated by Judge Fahy of this court in *Riley v. Titus*, 89 U.S. App.D.C. 79, 80-81, 190 F.2d 653, 654-55 (1951), as follows:

> "The appellant bases her suit for recovery under the Federal Tort Claims Act upon alleged misconduct of her superior officers prior to her discharge. For the most part, however, her complaint describes their action in only such general and conclusionary terms as 'arbitrary' and 'unlawful.' No factual allegations emerge from her voluminous pleadings and affidavits with sufficient clarity to show a basis for recovery on a theory of tort liability. At the

most there are only remote references to a 'conspiracy' and 'threats' by two persons who were her superiors at different times, in different states. In a parallel situation, this court has stated, 'Though it [the complaint] characterizes appellees' alleged conduct as wrongful, unlawful, and malicious, it does not sufficiently disclose the conduct to enable a court to judge whether or not it was tortious.' Burns v. Spiller, 1947, 82 U.S.App. D.C. 91, 161 F.2d 377, certiorari denied, 1947, 332 U.S. 792, 68 S.Ct. 101, 92 L.Ed. 373. See Rule 8(a), Fed.R.Civ.P. In that case the complaint was dismissed for failure to state a claim upon which relief could be granted there appearing no issue as to any material fact, the granting of summary judgment was proper in regard to this aspect of appellant's case for the same reason"

The judgment of the District Court is

Affirmed [1]

---

[1] Cf. *Engl* v. *Aetna Life Ins. Co.*, 139 F. 2d 469 (2d Cir. 1943); *Rizzi* v. *Murff*, 171 F. Supp. 362 (S.D.N.Y. 1959).

LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
NOV 16 1961
JOHN F. DAVIS, CLERK

No. 499

In the Supreme Court of the United States

October Term, 1961

[redacted], ET AL., PETITIONERS

v.

[redacted] ATTORNEY GENERAL, [redacted], ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted], D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes, regulations, and rule involved	2
Statement	8
Argument	11
Conclusion	15

CITATIONS

Cases:

Accardi, United States ex rel. v. *Shaughnessy*, 347 U.S. 260 — 13

Banco de Espana v. *Federal Reserve Bank of New York*, 28 F. Supp. 958, affirmed, 114 F. 2d 438 — 13

Fassilis v. *Esperdy*, 192 F. Supp. 84 — 12

Marion County Cooperative Ass'n v. *Carnation Co.*, 214 F. 2d 557 — 13

Riley v. *Titus*, 190 F. 2d 653, certiorari denied, 342 U.S. 855 — 13

Schneider v. *McKesson & Robbins, Inc.*, 254 F. 2d 827 — 13

Surkin v. *Charteris*, 197 F. 2d 77 — 14

Wiczynski, United States ex rel. v. *Shaughnessy*, 185 F. 2d 347 — 12

Williams v. *Kolb*, 145 F. 2d 344 — 13

Ziffrin v. *United States*, 318 U.S. 73 — 12

Statutes and rule involved:

Act of September 11, 1957, Section 15, 71 Stat. 643, 50 U.S.C. App. 1971a note — 2, 8

Immigration and Nationality Act of 1952, Section 245, as amended, August 21, 1958, 72 Stat. 699, 8 U.S.C. 1255 — 4, 8

Immigration and Nationality Act of 1952, Section 245(a), as amended, July 14, 1960, 74 Stat. 505 — 4, 5, 11

F. R. Civ. Proc., Rule 56 — 7, 13

Regulations:

Department of State Regulations:

Section 44.2, 22 C.F.R. 44.2 — 6, 12

Section 44.3, 22 C.F.R. 44.3 — 6, 12

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 499

CHUNG WING PING, ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 27–31; Pet. App. 13–18) is not yet reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on July 20, 1961 (R. 27, 32; Pet. App. 13). The petition for a writ of certiorari was filed on Octo-

[1] The record consists of a one-volume joint appendix which contains various papers and proceedings in the district court and the court of appeals, and to which reference will be made as "R". We have asked the district court to forward to this Court the administrative files of each of the petitioners

ber 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the cause is moot.

2. Whether, in a declaratory suit alleging an illegal agreement among government officials amounting to blanket prejudgment without regard to the individual merit of various applications for "refugee-escapee" visas, the district court properly granted the government's motion for summary judgment, where the administrative records indicated that the applications were considered on their merits, and the petitioners admitted that they had no knowledge or facts to support their conclusory allegations of an unlawful agreement.

3. Whether the district court properly denied a motion by the petitioners for a continuance to take depositions of various government officials, where the application was not made until ten months after the complaint had been filed, on the day before the court conducted a hearing on a motion by the government for summary judgment.

STATUTES, REGULATIONS AND RULE INVOLVED

Section 15 of the Act of September 11, 1957, 71 Stat. 643, 50 U.S.C. App. 1971a note, provides in pertinent part:

> SEC. 15(a) Notwithstanding the provisions of section 20 of the Refugee Relief Act of 1953, as amended * * *, special nonquota immigrant visas authorized to be issued under section 3 of that Act which remained unissued on Janu-

ary 1, 1957, shall be allotted, and may be issued by consular officers as defined in the Immigration and Nationality Act, in the following manner:

(1) Not to exceed two thousand five hundred visas to aliens described in * * * [irrelevant category];

(2) Not to exceed one thousand six hundred visas to aliens described in * * * [another irrelevant category];

(3) All the rest and remainder of said visas to aliens who are refugee-escapees as defined in subsection (c).

(b) The allotments provided in subsection (a) of this section shall be available for the issuance of immigrant visas to the spouses and unmarried sons or daughters under twenty-one years of age * * * of persons referred to in subsection (a) of this section if accompanying them: *Provided*, That each such alien as described in this section, is found to be eligible to be issued an immigrant visa and to be admitted to the United States under the provisions of the Immigration and Nationality Act: *Provided, further*, That all special nonquota immigrant visas authorized to be issued under this section shall be issued in accordance with the provisions of section 221 of the Immigration and Nationality Act: *Provided, further*, That a quota number is not available to such alien at the time of his application for a visa.

(c)(1) For purposes of subsection (a), the term "refugee-escapee" means any alien who, because of persecution or fear of persecution on account of race, religion, or political opinion has fled or shall flee (A) from any Communist,

> Communist-dominated, or Communist-occupied area * * *, and who cannot return to such area * * * on account of race, religion, or political opinion.
>
> * * * * *
>
> (d) Except as otherwise provided in subsection (a) of this section, nothing in this section shall be held to extend the Refugee Relief Act of 1953, as amended * * *, and nothing in this section shall be held to authorize the issuance of special nonquota immigrant visas in excess of the number provided in section 3 of that Act.

Section 245 of the Immigration and Nationality Act of 1952, as amended, August 21, 1958, 72 Stat. 699, but prior to the amendment of July 14, 1960, 74 Stat. 505, provided in pertinent part:

> (a) The status of an alien who was admitted to the United States as a bona fide nonimmigrant may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, (3) an immigrant visa was immediately available to him at the time of his application, and (4) an immigrant visa is immediately available to him at the time his application is approved. A quota immigrant visa shall be considered immediately available for

the purposes of this subsection only if the portion of the quota to which the alien is chargeable is undersubscribed by applicants registered on a consular waiting list.

(b) Upon the approval of an application for adjustment made under subsection (a), the Attorney General shall record the alien's lawful admission for permanent residence as of the date the order of the Attorney General approving the application for the adjustment of status is made, and the Secretary of State shall reduce by one the quota of the quota area to which the alien is chargeable under section 202 for the fiscal year current at the time such adjustment is made.

* * * * *

Section 245(a) of the Immigration and Nationality Act of 1952, as amended, July 14, 1960, 74 Stat. 505, provides:

The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

Department of State Regulation, Section 44.2, 22 C.F.R. 44.2, provides in pertinent part:

> (d) *Refugee-escapees.* This class shall consist of aliens who, because of persecution or fear of persecution on account of race, religion, or political opinion have fled or shall flee (1) from any Communist, Communist-dominated, or Communist-occupied area * * *, and who cannot return to such area, or to such country, on account of race, religion, or political opinion. An immigrant visa issued to an alien within the class described in this paragraph may be issued at any United States consular office which is authorized to issue immigrant visas * * *.

Department of State Regulation, Section 44.3, 22 C.F.R. 44.3, provides in pertinent part:

> (a) *Applicants for refugee-escapee classification.* In support of an application for refugee-escapee classification the alien shall submit a statement furnishing biographic data and describing the circumstances of his flight, escape, departure, or forceful removal from a Communist-dominated, or Communist-occupied area * * *, the hardship and persecution suffered, and a summary of his educational attainments, professional or technical abilities, and any manual skills or vocational experience which would tend to make such applicant of maximum value to the United States. This statement * * * shall be supported by character references from interested persons bearing upon the applicant's attachment to the principles of constitutional democratic government.

Rule 56, F.R. Civ. Proc., provides in pertinent part:

* * * * *

(b) *For Defending Party.* A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. * * *

* * * * *

(e) *Form of Affidavits; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

* * * * *

STATEMENT

The petitioners are seven Chinese nationals who entered the United States between 1947 and 1956 and have continuously remained in the United States up to the present time. Six entered between 1951 and 1956 as alien crewmen, receiving crewmen's landing permits, which were valid for no longer than 29 days. Petitioner Ng Yen entered through San Juan, Puerto Rico, in January 1947 as a "visitor for pleasure."

In individual deportation proceedings, each petitioner was found to be a deportable alien. Later, each applied to the Office of the District Director of the Immigration and Naturalization Service in New York for adjustment of status under Section 245(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1255(a), *supra*, pp. 4–5, to that of a permanently admitted refugee who had fled his native land due to fear of persecution on account of political opinion. In the meantime, each also applied to the Department of State for a special non-quota immigrant visa as "refugee-escapees" from Communist or Communist-dominated lands, under Section 15(a)(3) of the Act of September 11, 1957, 50 U.S.C. App. 1971a note, *supra*, pp. 2–4.

In 1959, the review committee of the Office of Refugee and Migration Affairs of the State Department rejected the applications of the crewmen-petitioners on the ground that some of them did not qualify as "refugee-escapees" since no showing was made that they left China on account of fear of perse-

cution, and that none of them possessed skills, abilities, education or experience which would make their presence in the United States of maximum value to the United States. The committee rejected the application of Ng Yen on the ground that he had "absolutely no claim" to refugee-escapee status since he was "outside of China many years before the Communists even threatened domination of that country."[2]

Following notification that the visa applications had been rejected, the Office of the District Director of the Immigration and Naturalization Service in New York denied the applications for adjustment of status. Five petitioners appealed this decision to the Office of the Regional Commissioner who subsequently affirmed the action taken by the District Director. All of the petitioners were notified that arrangements for their deportation to Hong Kong had been made and that they would be deported between August and November 1959.

On December 2, 1959, by complaint filed in the District Court for the District of Columbia, the petitioners and three others[3] sought a declaratory judg-

[2] The original applications of the petitioners to the Attorney General for discretionary relief were denied on the ground that existing regulations regarding alien crewmen made them ineligible for relief. The regulations were subsequently amended and the petitioners received notice to resubmit their applications, which was done.

[3] Two (Kwok Sui Kam and Wong Chong) did not appeal from the decision of the district court. The third did not join in the petition for a writ of certiorari.

ment that the government acted arbitrarily and contrary to law in denying their non-immigrant visa applications (R. 3–5). They alleged that the defendants (the Attorney General and the Secretary of State), pursuant to an illegal agreement, failed to consider the visa applications on the merits of the individual cases (R. 4). The government's answer, which denied these allegations and set up specific defenses, was filed on February 2, 1960 (R. 5–7).

Shortly thereafter, each of the petitioners' applications for "refugee-escapee" visas was reconsidered by the Office of Refugee and Migration Affairs in the State Department. The reviewing committee of that Office found no cause to alter its original opinions that the petitioners were ineligible for the non-quota status sought "because they [did] not meet the statutory and/or administrative standards prescribed for qualification under section 15 of the Act of September 11, 1957."

On September 9, 1960, the government moved for summary judgment on the ground that there was no genuine issue as to any material fact, and that it was entitled to a judgment as a matter of law (R. 7–8). The certified administrative record relating to each petitioner was filed in the district court with the motion. A hearing on the motion for summary judgment was set for October 19, 1960. On October 18, 1960, the petitioners filed a cross-motion for a continuance of the hearing until such time as they could take the affidavits of officials of the government with regard to the "policies devised by the Commissioner of Im-

migration and Naturalization" concerning treatment of applications of seamen for adjustment of status (R. 10–11). An accompanying affidavit of counsel indicated that the petitioners had no knowledge or information regarding the alleged "illegal agreement" among government officials but surmised that an agreement existed to deny applications of crewmen merely because they were seamen (R. 11–12).

Following argument on the applications, the district court, on October 25, 1960, granted the government's motion for summary judgment and denied petitioner's motion for a continuance for the purpose of taking depositions (R. 25). The court of appeals affirmed the order of the district court (R. 27–31; Pet. App. 13–18).

ARGUMENT

1. There is no occasion for further review by this Court. The case not only presents no issue of general importance but it is now moot insofar as the six petitioners who entered the United States as crewmen are concerned. On July 14, 1960, subsequent to the commencement of the instant action in the district court but prior to the entry of summary judgment, Section 245(a) of the Immigration and Nationality Act of 1952 was amended by Public Law 86–648 (74 Stat. 504) specifically to exclude the application of Section 245 to a "crewman." The Attorney General, through the Immigration and Naturalization Service, is now precluded from adjusting the status of those petitioners who entered the United States as crewmen since the amended statute, denying that form of

relief to alien crewmen, would have to be followed.[4] See *Ziffrin* v. *United States*, 318 U.S. 73, 78; *United States ex rel. Wiczynski* v. *Shaughnessy*, 185 F. 2d 347, 349 (C.A. 2); *Fassilis* v. *Esperdy*, 192 F. Supp. 84, 86–87 (S.D. N.Y.). As for the seventh petitioner (Ng Yen), who entered the United States in January 1947 as a "visitor for pleasure," there is not even colorable validity to the claim that his application was not individually considered. He was found to have "absolutely no claim" for a refugee-escapee visa, having been "outside of China many years before the Communists even threatened domination of that country." See 22 C.F.R. 44.2 and 44.3, *supra*, p. 6.

2. In any event, contrary to the petitioners' contention (Pet. 5–8), the district court properly granted the government's motion for summary judgment because there was no genuine issue of material fact to be determined in this case. The denial by the government, in its answer, of the conclusory allegations in the complaint that there was a "void and illegal agreement between the defendants" to discriminate against the petitioners and deny them proper consideration of their visa applications did not, in the circumstances of this case, present a genuine issue of material fact. In support of the motion for summary judgment, the government filed the certified administrative record relating to each of the petitioners which affirmatively showed that each of the applica-

[4] The government presented the issue of mootness to the court of appeals by way of supplemental memorandum. That court, however, did not reach the question of mootness, disposing of the appeal on the merits (Pet. App. 16).

tions was individually considered on the merits. Against this prima facie showing of proper administrative conduct, the petitioners presented no allegations of fact to substantiate their general allegations in the complaint of a "void and illegal agreement between the defendants." Indeed, counsel for the petitioners admitted in his affidavit and at the hearing on the summary judgment motion that he did not have any information or knowledge surrounding the alleged "illegal agreement," and that such knowledge or information was "solely" within the hands of the government (R. 11–12, 23, 24, 25).

In the face of the prima facie showing made by the government of proper administrative conduct, the conclusory allegations of the petitioners that there was improper conduct amounted to no more than suspicion or conjecture, and were insufficient to raise genuine issues of material fact sufficient to bar summary judgment under Rule 56, F.R. Civ. Proc., *supra*, p. 7. See, *e.g.*, *Riley* v. *Titus*, 190 F. 2d 653, 654–655 (C.A.D.C.), certiorari denied, 342 U.S. 855; *Marion County Cooperative Ass'n* v. *Carnation Co.*, 214 F. 2d 557, 561–562 (C.A. 8); *Schneider* v. *McKesson & Robbins, Inc.*, 254 F. 2d 827, 831 (C.A. 2) (dicta); *Banco de Espana* v. *Federal Reserve Bank of New York*, 28 F. Supp. 958, 973 (S.D. N.Y.), affirmed, 114 F. 2d 438 (C.A. 2); *Williams* v. *Kolb*, 145 F. 2d 344 (C.A.D.C.).[8]

[8] Petitioner's reliance upon *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, where this Court held that the allegations of prejudgment were sufficient to warrant a hearing in the district court in a habeas corpus action, is misplaced. [Footnote continued]

3. Finally, there is no merit to the petitioners' contention (Pet. 9–11) that the district court abused its discretion when it refused to grant a continuance for the purpose of allowing depositions to be taken of the government officials charged with the improper agreement. As shown in the Statement, *supra*, pp. 10–11, the application for a continuance was not filed until October 18, 1960, the day before the hearing was to take place on the government's motion for summary judgment, and more than ten months after the petitioners had filed their complaint in the district court. No effort at discovery was undertaken until the day before the hearing on the motion for summary judgment. It was thus within the court's proper discretion to deny the application on this score alone. See *Surkin* v. *Charteris*, 197 F. 2d 77, 79 (C.A. 5). As the court of appeals pointed out (R. 30; Pet. App. 17), "(d)iligent prosecution of a cause of action which is dependent for success upon discovery demands that the plaintiff seek discovery in preparation of his case and not as a backdoor defense to

---

In that case, the movant alleged that the Attorney General included the movant's name in a confidential list of "unsavory characters" whom the Attorney General wanted deported; and that the intention to deport the listed people was made clear when the list was circulated among the members of the Board of Immigration Appeals. A specific offer of proof that the Commissioner of Immigration could not do anything for the movant because the latter was on the Attorney General's list was made and rejected by the district court. In the instant case, there were no factual allegations to support the conclusory allegation that there was a "void and illegal agreement between the defendants," and, as noted above in the text, the administrative record showed the contrary.

a test of the merit of his claim." We add that, of course, we do not concede the right to obtain discovery of the type sought here on the basis of the sort of allegations made here—even if the efforts at discovery were timely pursued.

CONCLUSION

For the reasons set forth, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

NOVEMBER 1961.

U.S. GOVERNMENT PRINTING OFFICE: 1961